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Provisional summary record of the 3447th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 7 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) (continued)

Paragraph (20)

The Chair recalled that, at the previous meeting, paragraph (20) of the commentary to draft conclusion 7 had been left in abeyance pending consultations between the Special Rapporteur and another member of the Commission. He invited the Special Rapporteur to report on the outcome of those consultations.

Mr. Nolte (Special Rapporteur) said that, having consulted Mr. Murphy, he suggested the deletion of the first two sentences of the paragraph, which would then begin "It may be appropriate …". The remainder of the sentence would be unchanged. Footnote 281 would also be deleted and its contents moved to the end of footnote 282, prefaced by the words "See also".

Paragraph (20), as amended by the Special Rapporteur, was adopted.

Paragraph 3 – Interpretation versus modification or amendment

Sir Michael Wood suggested that, in the heading above paragraph (21), the order of "modification or amendment" should be reversed, to match the order in which they were presented in the 1969 Vienna Convention on the Law of Treaties. The Commission employed those terms randomly, but they were used in the Convention, rather artificially, to mean two quite different things; amendment signified something agreed by all the parties and modification signified something agreed among only some of the parties.

The Chair said that the Secretariat and the Special Rapporteur would be asked to check the references to amendment and modification in the commentary and adjust them where necessary.

It was so decided.

Paragraphs (21) to (32)

Paragraphs (21) to (32) were adopted.

Paragraph (33)

Sir Michael Wood invited the Special Rapporteur and the Secretariat to check the quotation in paragraph (33), which was actually taken from *Al-Saadoon and Mufdhi v. the United Kingdom* and which incorporated a reference to *Soering v. the United Kingdom*. In fact, it would be better to shorten the quotation, by deleting the initial phrase and keeping only a reference to *Soering*. The footnote should then cite *Soering*.

Mr. Murphy said that he agreed with the idea of focusing on the *Soering* case and citing that judgment of the European Court of Human Rights. The footnote relating to *Soering* should contain language which indicated that the Court had ultimately decided that there had been no amendment or modification of the European Convention on Human Rights. The introductory sentence of the following paragraph would then have to be reformulated, because the Court was in fact applying the reasoning from *Öcalan v. Turkey*.

Mr. Nolte (Special Rapporteur) said that the comments by Sir Michael Wood and Mr. Murphy were partly technical and partly substantive. The deletion of the first phrase in the quotation raised a substantive issue, because that phrase was important.

Sir Michael Wood said that, if that phrase was retained, the introduction should read "In the *Al-Saadoon and Mufdhi* case, the Court held …".

It was so decided.

Paragraph (33), as amended, was adopted.

Paragraph (34)

Mr. Murphy said it was his understanding that the Special Rapporteur had agreed that two sentences should be inserted from the *Al-Saadoon and Mufdhi* case and that the introductory sentence to the quotation might need to be adjusted accordingly. He took it that the Special Rapporteur would make the necessary changes.

Paragraph (34) was adopted on that understanding.

Paragraph (35)

Paragraph (35) was adopted.

Paragraph (36)

Sir Michael Wood said that the third sentence seemed to be highly speculative and a deduction from reading various judgments. The third and fourth sentences should either be deleted or the beginning of the third sentence should read "The conclusion could perhaps be drawn …".

The Chair said that it seemed rather pretentious to interpret the jurisprudence of the International Court of Justice without any solid foundation for doing so. He was therefore in favour of the amendment suggested by Sir Michael Wood and would prefer to end the paragraph after the quotation and footnote indicator in the third sentence.

Mr. Nolte (Special Rapporteur) said that the paragraph, which had previously been accepted by the Commission, was trying to express a balanced conclusion. It was not speculative, because it quoted a finding of the International Court of Justice. References had been made to interpretations of the Court which had stretched the ordinary meanings of words, but which were nevertheless permissible interpretations. The whole point of the commentary was to explain that there was an interrelationship between the possibility of interpretation and the possibility of modification and the reasons why modification or amendment by subsequent practice would not be accepted as influencing the way a treaty could be interpreted. He could agree to say in the last sentence "The Court seems to prefer …" in order not to be too categorical.

The Chair said he was concerned that the last sentence was couched in such general terms that it might seem to imply that it was the policy of the Court to accept broad interpretations in every case, whereas the Commission was referring to just one particular case.

Sir Michael Wood, supported by **Mr. Saboia**, said that he still disagreed with the final sentence. The Court would not be happy if it thought that the Commission was of the opinion that it stretched the ordinary meaning of the terms of a treaty. Therefore he still preferred to delete the last two sentences of the paragraph. Alternatively those two sentences could be replaced by one which included the quotation and which simply said: "No clear residual rule for such cases can be discerned from the jurisprudence of the International Court of Justice; however, the Court has stated that modification of a treaty by subsequent practice 'cannot be wholly precluded as a possibility in law'."

Mr. Nolte (Special Rapporteur) said that the paragraph was important, as it summarized the contents of the previous paragraphs. He proposed that the final sentence should read: "Instead, the Court seems to prefer to accept broad interpretations of the ordinary meaning of the terms of a treaty." He also agreed to start the third sentence with the wording "The conclusion could perhaps be drawn".

Paragraph (36), as amended, was adopted.

Paragraph (37)

Paragraph (37) was adopted.

Paragraph (38)

Mr. Murphy said that the paragraph was an important one, as it summed up the Commission's view on the possibility of using subsequent practice to amend or modify a treaty. He personally believed that, generally speaking, such a step was impossible, but the preceding paragraphs discussed the theoretical possibility of such action. The final clause of the first sentence was very weak and should be replaced with "the possibility of amending or modifying a treaty by subsequent practice has not been generally recognized". The last two sentences of the paragraph were also problematic, as they indicated that the interpreter might find other ways to modify a treaty. The Commission should not invite interpreters to use creative techniques to modify or amend a treaty. Those two sentences were superfluous and should be deleted.

Mr. Park said that the amendments proposed by Mr. Murphy would upset the balance of the wording agreed in the Drafting Committee.

Mr. Nolte (Special Rapporteur) said that paragraph (38) attempted to balance the various positions adopted on earlier occasions when the text had been discussed. He therefore disagreed with the proposal to delete the two last sentences, because they restated the proposition that rules of interpretation might lead to either a broader or a more limited interpretation and that all means of interpretation needed to be taken into account. Moreover, the last sentence provided a link with the following draft conclusion regarding the possibility of evolutive interpretation. He was prepared to add the sentence: "The actual occurrence and the possibility of amending or modifying a treaty is not to be presumed and has not generally been recognized." At such a late stage in proceedings, it would be inadvisable to upset the careful balance of the text.

Sir Michael Wood said that he felt quite uncomfortable agreeing to language which he did not fully understand. The last two sentences were unnecessary and missed the central point made in the paragraph. He was therefore in favour of their deletion. He agreed with Mr. Murphy that the phrase "is not to be presumed" was extremely weak. Perhaps it would be better to quote the more positive language used by the International Court of Justice, namely "cannot be wholly precluded".

Mr. Murphy, supported by **Mr. Tladi**, said that, while he agreed with Sir Michael Wood with regard to deleting the last two sentences, it was not clear how the amendment just proposed by him would work. The language which he himself had suggested echoed that in paragraph (21) which the Commission had just adopted and which was equally appropriate to the concluding paragraph of the commentary to draft conclusion (7).

Mr. Nolte (Special Rapporteur) said that the beginning and end of an analysis were not necessarily identical. The reference to the presumption should be included because both that presumption and the manner in which a treaty should be interpreted were related to the reason why modification by subsequent practice had not been generally recognized. It would therefore be wise to reflect the reasoning behind the draft conclusion. In order to move forward, he proposed that the final phrase of the first sentence should read "the actual occurrence of that effect and the possibility of amending or modifying a treaty by subsequent practice is not to be presumed and has not been generally recognized".

Mr. Park said that, in the light of the debate, he wished to retain the last two sentences.

Mr. Nolte (Special Rapporteur) said that, in order to accommodate the concerns of Sir Michael Wood and Mr. Murphy, the phrase, "including a possible evolutive interpretation of the treaty provision concerned" could be added to the end of the penultimate sentence.

Mr. Murphy said that the paragraph created an imbalance in the summing up of the section. If the Special Rapporteur felt strongly about retaining the last two sentences, they could be moved to a footnote.

Mr. Nolte (Special Rapporteur) said that he wondered why, if those two sentences were acceptable in a footnote, they should not be included in the text of the paragraph.

Mr. Murphy said that, ideally, they would not be placed in either a footnote or the text. Having them in the text would suggest that interpreters should seek to find creative ways, within the means of interpretation and by availing themselves of evolutive interpretation, to change a treaty. States had rejected that possibility at the United Nations Conference on the Law of Treaties, they still disliked it and it was generally deemed to be a step too far. For that reason, it would be inadvisable to end the paragraph summing up the commentary to draft conclusion 7 by expressing those ideas. If it would not be helpful to move them to a footnote, they should simply be deleted.

Mr. Nolte (Special Rapporteur) said that in 1968 States had rejected the possibility of modification by subsequent practice, whereas the two sentences at issue concerned interpretation in the light of subsequent practice. If, however, the only possibility of saving those two important sentences was to place them in a footnote, he was prepared to do so.

Paragraph (38), as amended, was adopted.

The commentary to draft conclusion 7, as a whole, as amended, was adopted.

Commentary to draft conclusion 8 (Interpretation of treaty terms as capable of evolving over time)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

Mr. Murphy suggested that, in the fourth sentence of the paragraph, the two phrases in quotation marks should be separated by a comma, not "or", and the second quotation should be followed by "and sacred trust". The following sentence should then be recast to read: "The International Court of Justice, in its *Namibia* opinion, gave 'sacred trust' an evolving meaning so as to conclude 'that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned'."

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (15)

Paragraphs (7) to (15) were adopted.

Paragraph (16)

Mr. Murphy suggested that, in line with the Commission's usual practice, the word "jurisprudence" in the second sentence should be changed to "pronouncement", as it referred to the output of a human rights treaty body.

Mr. Nolte (Special Rapporteur) said that a term was needed that conveyed the sense of accumulated practice, rather than simply a sequence of pronouncements.

Mr. Rajput, pointing out that paragraph (18) referred to "the jurisprudence of international courts and tribunals and the pronouncements of expert treaty bodies", said that the same terms should be used in the interests of consistency, unless otherwise required by context.

Sir Michael Wood expressed the view that no change was needed, especially as the paragraph went on to quote the treaty body in question referring to its own "jurisprudence".

Mr. Murphy said that the term "pronouncement" was used consistently in relation to treaty bodies; the Commission had explained elsewhere why the term "jurisprudence" should be avoided in that context. Wording such as "the Committee abandoned its pronouncements" might address Mr. Nolte's concern.

Mr. Saboia said that the Commission should be more liberal in its use of the word "jurisprudence", particularly as it appeared in the quotation that followed.

Mr. Park, expressing support for Mr. Murphy's comments, suggested using the word "views", as in the official citation given in footnote 358.

The Chair suggested wording to the effect that the Committee had "abandoned its repeated pronouncements based on *Kindler*".

Mr. Saboia proposed using the words "pattern of pronouncements".

Mr. Nolte (Special Rapporteur) said that he could accept either of the proposals made by Mr. Saboia and the Chair but would prefer the words "repeated pronouncements".

Mr. Ouazzani Chahdi emphasized the need to ensure that the various language versions of the text were accurate and consistent.

The Chair said he took it that the Commission agreed to amend paragraph (16) along the lines he had suggested, for which the Special Rapporteur had expressed a preference.

Paragraph (16), as amended, was adopted.

Paragraph (17)

Mr. Rajput said that the paragraph faithfully represented the views of the international arbitral tribunal under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in the case of *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* and the evolution of relevant practice; however, the fact that the Convention contained no definition of "investment" meant that such evolution had not occurred in the context of the Convention as such. He would be happy to provide additional information so that the paragraph could be amended accordingly, particularly in terms of how the quotation was presented.

Mr. Nolte, welcoming that clarification, requested that the paragraph be left in abeyance to allow him to consult Mr. Rajput and find an appropriate solution.

The Chair said he took it that the Commission agreed to that suggestion.

It was so decided.

Paragraph (18)

Mr. Nolte (Special Rapporteur) suggested that, in the light of the discussion on the terms "jurisprudence" and "pronouncements" in relation to paragraph (16), the definite article should be deleted before the word "pronouncements" in the first sentence of paragraph (18) so as to make the reference more general.

Paragraph (18), as amended, was adopted.

Paragraphs (19) and (20)

Paragraphs (19) and (20) were adopted.

Commentary to draft conclusion 9 (Weight of subsequent agreements and subsequent practice as a means of interpretation)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Murphy said that the paragraph dealt with the jurisprudence of the European Court of Human Rights but appeared to extrapolate certain notions to cover the whole field of human rights. He suggested that the purely European context be clarified by altering the words "human rights treaties", in the second sentence, to a specific reference to the

Convention for the Protection of Human Rights and Fundamental Freedoms and, in the third sentence, changing "the national legislation of States parties" to "the national legislation of its States parties", referring back to that Convention.

Mr. Nolte (Special Rapporteur) said that the passage in question was intended to encapsulate a general point. Common elements in the legislation of States could be relevant in determining the scope of a human right or the necessity of restricting it. The issue was not specific to the European Court of Human Rights.

The Chair said that, as drafted, the paragraph gave the impression of referring only to the European context. For consistency, it should either be supplemented by references to other regional human rights systems or amended as suggested by Mr. Murphy.

Mr. Nolte (Special Rapporteur) said that, on reflection, and in the light of the Chair's comments, he could accept Mr. Murphy's suggestions; for the sake of clarity, the words "its States parties" could be further amended to "its member States".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

Mr. Nolte (Special Rapporteur) said that Mr. Park had enquired, informally, whether a more appropriate term than "unmindful" might be used in the third sentence. In his view, the existing text was clear, but he was open to suggestions on how it might be improved.

The Chair said that, in the absence of any comments, he took it that the Commission agreed to adopt the paragraph as it stood.

Paragraph (6) was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Park to change the term "collective practice" to "common practice" in the second sentence of the paragraph, with which he agreed.

Paragraph (8), as amended, was adopted.

Paragraphs (9) and (10)

Paragraphs (9) and (10) were adopted.

Paragraph (11)

Mr. Nolte (Special Rapporteur) said that Mr. Park had asked him informally about whether the term "one-off practice" should be changed to "one-time practice" in the last sentence of the paragraph. He would prefer the former, which he felt carried more of the connotation of something unintentional.

Mr. Park said that altering the term to "one-time practice" would be consistent with paragraph (36) of the commentary to draft conclusion 4.

The Chair said he took it that the Commission agreed to Mr. Park's suggestion.

Paragraph (11), as amended, was adopted.

Paragraphs (12) to (14)

Paragraphs (12) to (14) were adopted.

Paragraph (15)

Paragraph (15) was adopted with a minor editorial change.

Commentary to draft conclusion 10 (Agreement of the parties regarding the interpretation of a treaty)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Tladi to insert the words "regarding interpretation" after "Conflicting positions" in the first sentence. While he did not consider such a change necessary, he did not object to it.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Murphy suggested that the last sentence of paragraph (4) should be deleted: by singling out a particular group of treaties — those relating to human rights or refugees — it seemed to contradict the statement in paragraph (15) of the commentary to draft conclusion 2 that the Commission had decided not to refer to the "nature" of a treaty in order not to call into question the unity of the interpretation process and to avoid any categorization of treaties. Moreover, it had no basis in the 1969 Vienna Convention and no citations were given.

Mr. Nolte (Special Rapporteur) said that there was a difference between undermining the unity of the interpretation process and giving examples by referring to a specific group of treaties. In the present case, reference was made to human rights treaties as the clearest illustration of the point that variation among States in the application of a particular instrument should not be taken as disagreement as to the interpretation thereof; rather, States exercised the discretion provided for in the instrument in different ways.

Sir Michael Wood said that the sentence in question presented problems of form and content. Semantically, it was odd to talk of treaties themselves "aim[ing] at a uniform interpretation". In terms of content, the notion of treaties "characterized by considerations of humanity or other general community interests" was unusual and unclear. The concept of "a margin of appreciation for the exercise of discretion by States" was familiar in the European context of the Convention for the Protection of Human Rights and Fundamental Freedoms but inappropriate if read in conjunction with the reference to treaties on refugees. The issues of content might be overcome by amending the sentence to read: "Some treaties tend to aim at a uniform interpretation but also leave a margin of appreciation for the exercise of discretion by States."

Mr. Nolte (Special Rapporteur), while acknowledging Sir Michael Wood's concerns, said that referring to "some treaties" would rob the sentence of its purpose, which was to provide an example. He suggested instead that it could be altered to read: "Treaties relating to human rights, for example, tend to aim at a uniform interpretation but also leave a margin of appreciation for the exercise of discretion by States." If "margin of appreciation" was felt to be too European a concept, the words "to leave room for" could be used.

Ms. Lehto said that the concept of "considerations of humanity" had been used previously by both the Commission and the International Court of Justice; however, she had no objection to the reformulation proposed by the Special Rapporteur.

Mr. Murphy said that the aim of uniform interpretation was common to all treaties, even if some allowed for the exercise of discretion; however, the Special Rapporteur's proposal was an improvement on the text as drafted.

The Chair said he took it that the Commission agreed to amend the sentence to read: "Treaties relating to human rights, for example, tend to aim at a uniform interpretation but also leave room for the exercise of discretion by States."

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Nolte (Special Rapporteur) relayed a suggestion made informally by Mr. Park that, in footnote 409, the term "single common act" should be altered to "common act".

With that amendment to footnote 409, paragraph (7) was adopted.

Paragraph (8)

Mr. Murphy pointed out that, while mention was made of the Bechuanaland authorities in paragraph (8), there was no reference to the Caprivi authorities. He suggested that the second part of the third sentence be altered to read: "... the 'Bechuanaland authorities were fully aware of and accepted' the interpretation of the Caprivi authorities with respect to the treaty boundary."

Sir Michael Wood suggested that, in the first sentence, it should be specified that articles 31 (3) (a) and (b), not (c), of the 1969 Vienna Convention were meant. He sought clarification of the link between the first sentence and the second and the interplay between the requirement for awareness and acceptance of the position of the other party or parties and the character of the treaty obligation in question.

Mr. Nolte (Special Rapporteur) said that some changes had been introduced to the paragraph in the light of the debate that had taken place in the first part of the session. Mr. Murphy had argued that mutual awareness of practice was not always required. States could have a uniform practice in relation to a treaty implemented at the national level without exchanging information on their implementation of the treaty, and courts would be required to take such practice into account. However, that was true only in certain circumstances, and the language used in the paragraph was thus rather cautious. The *Kasikili/Sedudu Island* case had been referenced in order to draw attention to the requirements that had to be met in order to establish subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention.

Sir Michael Wood proposed that the second sentence should be deleted, as the character of the treaty obligation in question was not the only factor that determined the conditions that had to be met in order to establish that an agreement under article 31 (3) of the Convention was "common".

Mr. Tladi said that, in the relevant paragraph of its judgment, the International Court of Justice had made clear that the full awareness and acceptance of the Bechuanaland authorities was indeed a requirement. The language proposed by Mr. Murphy accurately reflected the text of that paragraph of the judgment and could therefore be accepted by the Commission.

Mr. Nolte (Special Rapporteur) said that he accepted Mr. Murphy's and Sir Michael Wood's proposals.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Paragraph (10) was adopted with a minor editorial change.

Paragraphs (11) to (24)

Paragraphs (11) to (24) were adopted.

The commentary to draft conclusion 10 as a whole, as amended, was adopted.

Part Four (Specific aspects) Commentary to draft conclusion 11 (Decisions adopted within the framework of a Conference of States Parties)

Paragraphs (1) to (22)

Paragraphs (1) to (22) were adopted.

Paragraph (23)

Mr. Murphy proposed that a sentence break should be inserted after the words "article 31, paragraph 3 (a)" in the first sentence, as none of the preceding examples demonstrated that decisions of conferences of States parties might give rise to subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention or to other subsequent practice under article 32.

Mr. Nolte (Special Rapporteur) said that he was reluctant to accept that proposal. It was obvious that such decisions could give rise to subsequent practice under article 31 (3) (b) of the Convention or to other subsequent practice under article 32. The use of the word "may" already ensured some degree of caution.

The Chair said that one solution might be to repeat the word "may".

Sir Michael Wood suggested that Mr. Murphy's proposal could be implemented by replacing the words "and give rise to" at the beginning of the new sentence with "They may also give rise to". That suggestion would make it clear that, although it was possible that decisions of conferences of States parties could give rise to subsequent practice under article 31 (3) (b) of the Convention or to other subsequent practice under article 32, the preceding examples did not necessarily demonstrate that possibility.

Mr. Murphy said that he accepted Sir Michael Wood's suggestion, but he would prefer to begin the new sentence with the words "Such decisions" instead of "They".

Paragraph (23), as amended, was adopted.

Paragraphs (24) to (27)

Paragraphs (24) to (27) were adopted.

Paragraph (28)

Mr. Murphy proposed that the words "as long as it reflects the agreement of all the parties" should be inserted at the end of the second sentence, as paragraph (28) was the first paragraph of the commentary to draft conclusion 11 to address its third paragraph specifically.

Mr. Nolte (Special Rapporteur) said that Mr. Murphy's proposal would distract from the main focus of the second sentence, namely the distinction between substance and form. In addition, the same information had already been repeated ad nauseam. As a compromise, he proposed that the words "among all the parties" should be inserted after "agreements" in the first sentence.

Sir Michael Wood asked whether the language proposed by the Special Rapporteur covered article 31, paragraph 3, of the 1969 Vienna Convention in general or article 31, paragraph 3 (a), specifically.

Mr. Nolte (Special Rapporteur) said that it related to article 31, paragraph 3, of the Convention in general.

Paragraph (28), as amended, was adopted.

Paragraphs (29) to (37)

Paragraphs (29) to (37) were adopted.

Paragraph (38)

Mr. Murphy proposed deleting, in the first sentence, the words "that are adopted by consensus", which unnecessarily limited the range of resolutions covered in the paragraph, and inserting the word "legally" before "binding", which would ensure consistency with the rest of the paragraph. With regard to the last sentence, he proposed replacing the reference to article 31, paragraph 3 (a), of the 1969 Vienna Convention with a reference to article 31, paragraph 3, of that Convention.

Mr. Nolte (Special Rapporteur) said that he could accept all three of Mr. Murphy's proposals. With regard to the third of those proposals, it could be argued that, if not all States parties agreed with an interpretative resolution, it would constitute State practice under article 31 of the Convention.

Mr. Park said that it made no sense to delete the words "that are adopted by consensus" from paragraph (38) because draft conclusion 11 (3) included the words "including adoption by consensus". As an alternative, he proposed that the words "that are adopted by consensus" should be replaced with "including those that are adopted by consensus".

Mr. Murphy said that the context of paragraph (38) of the commentary was different from that of draft conclusion 11 (3). In the first sentence of paragraph (38), there was no need to specify that even resolutions adopted by consensus were included. The general message of draft conclusion 11 (3) was that any decision of a conference of States parties, regardless of its form, might be relevant as a subsequent agreement or subsequent practice. If the Commission wished to introduce the notion of consensus into paragraph (38), it would be necessary to incorporate additional language from the draft conclusion. However, he would prefer not to do so, as the aim of paragraph (38) was to sum up the commentary to draft conclusion 11 as a whole.

Mr. Park said that the word "adoption" had been inserted into the text of draft conclusion 11 (3) at an earlier stage in order to accommodate the concerns of certain Commission members, including Mr. Murphy.

Mr. Nolte (Special Rapporteur) said it was true that the reference to consensus in paragraph (38) was not the same as that in previous paragraphs. However, the notion of consensus had been discussed at length in previous paragraphs and should therefore be mentioned in paragraph (38). It was a matter of emphasis, and the acceptance of Mr. Park's proposal would do no harm.

Mr. Murphy said that, on the contrary, Mr. Park's proposal would represent a distortion of what had been agreed in the Commission. Although he would be prepared to accept a decision to incorporate additional language from draft conclusion 11 (3), including a reference to the form and procedure by which a decision was adopted, he was not prepared to accept a decision to incorporate only a few words of that draft conclusion out of context.

Mr. Nolte (Special Rapporteur) said that he was uncomfortable with the repetition of the same information in multiple paragraphs. He was prepared to accept either the deletion of the words "that are adopted by consensus" or the replacement of those words with "including those that are adopted by consensus". However, he did not understand Mr. Murphy's concern. He proposed that the discussion of the paragraph should be left in abeyance in order to give Mr. Murphy and Mr. Park the opportunity to engage in informal consultations on the paragraph.

The Chair said he took that the Commission wished to leave paragraph (38) in abeyance pending the outcome of those informal consultations.

It was so decided.

Commentary to draft conclusion 12 (Constituent instruments of international organizations)

Paragraphs (1) to (13)

Paragraphs (1) to (13) were adopted.

Paragraph (14)

Mr. Murphy proposed that footnote 535 should be deleted, as the Convention on International Civil Aviation was not "implemented" by bilateral air transport agreements.

Mr. Nolte (Special Rapporteur) said that the word "implemented" was used in the body text to reflect the fact that the goals of the constituent instruments of international organizations were sometimes realized by subsequent bilateral or regional agreements or practice. He wondered whether a more appropriate word than "implemented" could be found.

The Chair suggested that the word "followed" could be used instead of "implemented".

Sir Michael Wood said that bilateral services agreements were entirely voluntary under the Convention on International Civil Aviation. It would be wrong to say that such agreements "implemented" that Convention.

Mr. Murphy said that, as he understood it, the claim being made in the paragraph was that bilateral or regional agreements were relevant to the interpretation of constituent instruments of international organizations. He objected not to the use of the word "implemented" in the body text but to the example of the Convention on International Civil Aviation in the footnote.

The Chair said that the third sentence of the paragraph seemed to explain the situation.

Mr. Nolte (Special Rapporteur) said that, in a sense, the "subsequent bilateral or regional agreements" referred to in the second sentence of the paragraph sought to "flesh out" the constituent instrument and might thereby contribute to its interpretation. However, he would not insist on retaining the footnote.

Mr. Park said that the first line of the footnote should be deleted in any case, as it could not be said that bilateral agreements constituted or reflected subsequent agreements in relation to the interpretation of the Convention on International Civil Aviation.

Paragraph (14) was adopted, subject to the deletion of footnote 535.

Paragraph 2 — subsequent agreements and subsequent practice as "arising from" or "being expressed in" the reaction of States parties

Mr. Murphy proposed that, in the heading above paragraph (15), the words "reaction of States parties" should be replaced with the words "practice of an international organization", in order to align the heading with the wording of paragraph 2 of draft conclusion 12.

The Chair suggested that, rather than replace "reaction of States parties", the words "to the practice of international organizations" should be added to the end of the heading.

Mr. Murphy said that he stood by his original proposal; however, if it was considered necessary to include a reference to States parties in the heading, he would suggest referring to "subsequent agreements and subsequent practice of States parties as 'arising from' or 'being expressed in' the practice of an international organization".

Mr. Nolte (Special Rapporteur) said that he agreed with Mr. Murphy's revised proposal.

The Chair said he took it that the Commission agreed to change the heading as proposed by Mr. Murphy.

It was so decided.

Paragraph (15)

Mr. Murphy said that it was necessary to redraft the final sentence because it failed to capture the two aspects described in the paragraph. Alternatively, the sentence could be deleted, since it was not substantive in nature.

Mr. Nolte (Special Rapporteur) proposed that the paragraph should be held in abeyance to allow additional time for consultations.

It was so decided.

Paragraphs (16) to (34)

Paragraphs (16) to (34) were adopted.

Paragraph (35)

Sir Michael Wood proposed the deletion of footnote 571 because he considered it out of place in commentaries drafted by the Commission. If that proposal was not acceptable, the final reference cited in the footnote should be deleted, as it was not appropriate.

Mr. Nolte (Special Rapporteur) said that the footnote referred to one of the big questions of international institutional law, namely the possible "constitutional" interpretation of the constituent instruments of international organizations. He would therefore prefer to retain it.

The Chair said that the final reference cited in the footnote was a work by Sir Michael Wood, who, as a member of the Commission had taken part in the consideration of the topic and in the adoption of the draft conclusions. Its inclusion in footnote 571 in relation to a draft conclusion that the Commission would adopt unanimously might be awkward. He therefore agreed that the final reference in the footnote should be deleted; however, the rest of the footnote should be retained.

With that amendment to footnote 571, paragraph (35) was adopted.

Paragraphs (36) to (42)

Paragraphs (36) to (42) were adopted.

Commentary to draft conclusion 13 (Pronouncements of expert treaty bodies)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi said that the first sentence expressed an empirical statement that might not be true, and, in fact, was probably not true, since, even though members of an expert body acted in their individual capacity, they sometimes did receive governmental instructions. He therefore proposed the replacement of the words "free from governmental instructions" with "do not represent States". That was an empirically and normatively true statement that could safely be made.

The Chair said that due consideration should be given to the situation in which members of expert treaty bodies were the persons who issued instructions in their respective foreign ministries.

Mr. Nolte (Special Rapporteur) said it was true that there were independent experts who were under governmental instructions, even if they were not supposed to be. The statement "are free" was not a factual statement but rather a normative one. The usual understanding was that, in order to be independent, a member of an expert treaty body

needed to be free from governmental instructions. If the Commission hesitated to state that, it risked calling its own integrity into question.

Mr. Tladi said that the Special Rapporteur had talked of being "independent". Certainly when one was independent, it meant that one was acting in a manner that was free from governmental instructions. But the expression "serving in their personal capacity" did not necessarily mean that, even if that was what it should mean.

Mr. Jalloh said that, since footnote 596 referred to article 28 (3) of the International Covenant on Civil and Political Rights, which, in turn, indicated that "the members of the Committee shall be elected and shall serve in their personal capacity", perhaps the Commission should avoid getting into a debate about what was meant by that expression.

Mr. Nolte (Special Rapporteur) said that the Commission must explain what "serving in their personal capacity" meant, and it obviously meant that one was free from governmental instructions.

Sir Michael Wood said that the expression "serving in their personal capacity" meant that the members of an expert treaty body were free, not only from governmental instructions, but all instructions — including those of non-governmental organizations, for example — when they acted in that capacity. He proposed that the words "free from governmental" in the first sentence should be replaced with the words "not subject to".

Mr. Rajput proposed that the words "are free from" should be replaced with the words "that do not function under".

Mr. Saboia said that Mr. Rajput's proposal went in the right direction, but he preferred Sir Michael Wood's proposal because it was broader. There were indeed influences that went beyond governmental instructions that should also be avoided.

Mr. Jalloh supported Sir Michael Wood's proposal, as it made the paragraph stronger and appeared to address Mr. Tladi's concern.

Paragraph (3), as amended by Sir Michael Wood, was adopted.

Paragraph (4)

Mr. Tladi said that he had some difficulty with the statement in the second sentence. It was hard to accept, for example, that the Commission's draft conclusions on the current topic could be said to be the pronouncement of the United Nations on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties. Consequently, he would propose the deletion of the second sentence.

Mr. Nolte (Special Rapporteur) said that the International Law Commission was a body which was an organ of the United Nations, and its draft conclusions were therefore attributable to the United Nations and not to any State or other subject of international law.

Mr. Tladi said that he did not agree that the reports of the special rapporteurs, for example, were attributable to the United Nations.

The Chair said that the second sentence referred to the output of a body that was an organ of an international organization, which presupposed a process, which in the Commission's case, involved the submission of reports by special rapporteurs. However, those reports were not the Commission's output. Its output would consist, in the current case, of the text of the draft conclusions, as adopted on second reading, which represented many years of elaboration. It should be recalled that the Commission had been established as a means of undertaking a mandate of the General Assembly under the Charter of the United Nations. It would be difficult to find a more direct connection to the United Nations than that relating to the Commission.

Sir Michael Wood said that he found the second sentence to be problematic for the same reasons that Mr. Tladi did. It was also unnecessary, as the position taken in it was explained very well in the rest of the paragraph. The Commission had taken a pragmatic decision not to deal with the practice of international organizations and to limit its study to the expert treaty bodies that were not organs of an international organization. But it had not

done so for the reason given in the second sentence, and nothing would be lost by deleting it.

Mr. Nolte (Special Rapporteur) agreed with deleting the second sentence but suggested keeping the part of footnote 599 that related to the Working Group on Arbitrary Detention and transposing it to footnote 598, as it was important to give examples of expert treaty bodies that were not covered by draft conclusion 13.

Paragraph (4), as amended by the Special Rapporteur, was adopted.

Paragraph (5)

Mr. Park said that the number and date of the resolution referred to in footnote 600 was incorrect: the Economic and Social Council had established the Committee by its resolution 1985/17 of 28 May 1985.

The Chair said that the Secretariat would correct footnote 600 as necessary.

Paragraph (5), as amended, was adopted on that understanding.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Park said that the last sentence of the paragraph referred to bodies that might be authorized to interpret treaties other than those under which they were established. However, the Committee on Economic, Social and Cultural Rights did not fit that category, since it had not been established under a treaty. He therefore wondered if the example provided in footnote 612 was appropriate.

Mr. Nolte (Special Rapporteur) said that, in footnote 612, reference was made to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and thus to a treaty that was not the treaty that the Committee usually interpreted. Perhaps the reference to General Assembly resolution 63/117, to which the Optional Protocol was annexed, was the source of the misunderstanding. To remedy that, he suggested the deletion of the reference to the resolution in the footnote.

With that amendment to footnote 612, paragraph (7) was adopted.

Paragraph (8)

Paragraph (8) was adopted.

The meeting rose at 6 p.m.